

The International Law of the Sea

Second Edition

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Third, Article 39(3)(a) and (b) provides that aircraft in transit passage shall:

- (a) observe the Rules of the Air established by the International Civil Aviation Organization as they apply to civil aircraft; state aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation;
- (b) at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency.

Concerning Article 39(3)(a), a question arises whether or not States bordering straits have a right to issue and apply their own air regulations in the airspace of the straits used for international navigation. Upon signature and ratification of the LOSC, the Spanish government claimed such a right. However, the United States objected to the Spanish interpretation.¹¹² Whilst opinions of writers are divided,¹¹³ the Secretariat of ICAO took the view that the Rules of the Air as adopted by the Council of ICAO would have mandatory application over the straits and the States bordering the strait cannot file an alteration to Rules of the Air under Article 38 of the Chicago Convention with respect to the airspace over the straits.¹¹⁴

4.6 Rights and obligations of coastal States bordering straits

The coastal State has a right to adopt laws and regulations relating to transit passage through straits. Under Article 42(1), those laws and regulations involve:

- (a) the safety of navigation and the regulation of maritime traffic, as provided in Article 41,
- (b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait,
- (c) with respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear, and
- (d) the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits.

States bordering straits are required to give due publicity to all such laws and regulations in accordance with Article 41(3). Further, the coastal State bordering straits may designate sea lanes and prescribe traffic separation schemes for navigation in straits where necessary to promote the safe passage of ships pursuant to Article 41(1).

¹¹² Roach and Smith, *Excessive Maritime Claims*, pp. 290–293.

¹¹³ Yturriaga is supportive of the Spanish claim, but Caminos considers that the Spanish claim is inappropriate. Yturriaga, *Straits Used for International Navigation*, pp. 227–232; Caminos, 'The Legal Regime of Straits', p. 229.

¹¹⁴ *Virginia Commentaries*, vol. 2, pp. 344–345. It must be noted that the Rules of the Air do not automatically apply to State aircraft, including military aircraft in the airspace over the straits.

The legislative jurisdiction of the coastal State is qualified by paragraph 2 of Article 42 in two respects. The first limitation is that the laws and regulations of the coastal State bordering international straits 'shall not discriminate in form or in fact among foreign ships'.¹¹⁵ The second limitation is that the application of the laws and regulations shall not 'have the practical effect of denying, hampering or impairing the right of transit passage'. In relation to this, there is the question whether, in the case of the violation of the municipal law of the State bordering straits, that State could terminate the right of transit passage unilaterally. The language of Article 42(2) seems to suggest that States bordering straits are not allowed to directly deny the right of transit passage merely on grounds of breach of their municipal law.¹¹⁶ In the case of a violation of the laws and regulations referred to in Article 42(1)(a) and (b), however, Article 233 of the LOSC explicitly allows the State bordering a strait to exercise its enforcement jurisdiction.

Coastal States bordering straits shall undertake the following duties in accordance with Article 44:

- (i) not to hamper transit passage,
- (ii) to give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge, and
- (iii) not to suspend transit passage.

Moreover, Article 43 of the LOSC requires user States and States bordering a strait to cooperate '(a) in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aid of international navigation; and (b) for the prevention, reduction and control of pollution from ships'. By way of example, Japan has been promoting international cooperation in the Straits of Malacca and Singapore through the Malacca Strait Council in such fields as hydrographic survey, maintenance of aids to navigation, making nautical charts, transfer of technology and clearance of sunken ships.¹¹⁷ In September 2007, the Cooperative Mechanism on Safety of Navigation and Environmental Protection in the Straits of Malacca and Singapore was launched as a result of a series of IMO-sponsored meetings on the Straits of Malacca and Singapore. The Cooperative Mechanism aims to promote dialogue and facilitate close cooperation between the littoral States, user States and other stakeholders. The establishment of the Cooperative Mechanism can be considered as a realisation of Article 43 of the LOSC.¹¹⁸

¹¹⁵ This provision has parallels in Articles 24(1)(b), 25(3), 52(2) and 227 of the LOSC. *Virginia Commentaries*, vol. 2, p. 376.

¹¹⁶ *Ibid.*, p. 377; J. N. Moore, 'The Regime of Straits and the Third United Nations Conference on the Law of the Sea' (1980) 74 *AJIL* p. 103. However, it is not suggested that the State bordering straits cannot exercise its enforcement jurisdiction if the ship should enter that State's ports.

¹¹⁷ H. Terashima, 'Transit Passage and Users' Contributions to the Safety of the Straits of Malacca and Singapore', in M. H. Nordquist, T. T. B. Koh and J. N. Moore, *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (Leiden and Boston, Nijhoff, 2009), pp. 357–368.

¹¹⁸ See IMO, The Cooperative Mechanism between the Littoral States and User States on Safety of Navigation and Environmental Protection in the Straits of Malacca and Singapore, Submitted by Indonesia, Malaysia and Singapore, IMO/SGP 2.1/1, 16 August 2007. See also the Singapore Statement on Enhancement of Safety, Security and Environmental Protection in the Straits of Malacca and Singapore, 6 September 2007, available at: www.mpa.gov.sg/sites/pdf/spore_statement.pdf; J. H. Ho, 'Enhancing Safety, Security, and Environmental Protection of the Straits of Malacca and Singapore: the Cooperative Mechanism' (2009) 40 *ODIL* pp. 233–247.

Finally, environmental protection of international straits should be mentioned. As international straits are often narrow, the risk of marine casualties is higher than in other marine spaces. Thus the health of waterways is a matter of serious concern for States bordering international straits. In this regard, the question arises as to whether, under Part III of the LOSC, the coastal State has a right to introduce a compulsory pilotage system in an international strait.

A case in point is the compulsory pilotage system in the Torres Strait adopted by Australia.¹¹⁹ The Torres Strait is a strait used for international navigation to which the regime of transit passage applies. The depths of the Torres Strait are shallow and there are many reefs and shoals within the strait. The strait is also subject to highly complex tidal variation. As a consequence, navigation in that strait is extremely difficult. As the Torres Strait contains a highly sensitive marine habitat, it became a Particularly Sensitive Sea Area (PSSA) by IMO Resolution MEPC.133(53) adopted on 22 July 2005. Subsequently, Australia introduced in 2006 a compulsory pilotage system for certain vessels within the Torres Strait and Great North East Channel in order to protect sensitive marine habitats.

According to Marine Notice 8/2006, the compulsory pilotage system applies to merchant ships 70 metres in length and over or oil tankers, chemical tankers and liquefied gas carriers, irrespective of size, when navigating the Torres Strait and the Great North East Channel. According to Marine Notice 16/2006, the Australian authorities will not suspend or deny transit passage and will not stop, arrest, or board ships that do not take on a pilot while transiting the Strait.¹²⁰ However, the owner, master, and/or operator of the ship may be prosecuted on the next entry into an Australian port, for both ships on voyages to Australian ports and ships transiting the Torres Strait en route to other destinations. Australia's compulsory pilotage system was protested by the United States and Singapore.¹²¹ The controversy relating to the compulsory pilotage system in the Torres Strait seems to signal a growing tension between the navigational interest of the user States and the environmental interest of States bordering an international strait. Later, Australia changed its position and effectively exempted vessels from compulsory pilotage if they

¹¹⁹ Generally on this issue, see R. C. Beckman, 'PSSAs and Transit Passage: Australia's Pilotage System in the Torres Strait Challenges the IMO and UNCLOS' (2007) 38 *ODIL* pp. 325–357; J. Roberts, 'Compulsory Pilotage in International Straits: The Torres Strait PSSA Proposal' (2006) 37 *ODIL* pp. 93–112; S. Bateman and M. White, 'Compulsory Pilotage in the Torres Strait: Overcoming Unacceptable Risks to a Sensitive Marine Environment' (2009) 40 *ODIL* pp. 184–203; E. Egede, 'International Straits, Compulsory Pilotage and the Protection of the Marine Environment', in R. Caddell and R. Thomas, *Shipping, Law and the Marine Environment in the 21st Century: Emerging Challenges for the Law of the Sea – Legal Implications and Liabilities* (Oxford, Lawtext Publishing, 2013), pp. 35–52; D. R. Rothwell, 'Compulsory Pilotage and the Law of the Sea: Lessons Learned from the Torres Strait', ANU College of Law Research Paper No. 12–06, pp. 1–20, available at: <http://ssrn.com/abstract=2020781>.

¹²⁰ Australian Maritime Safety Authority, Marine Notice 8/2006, Revised Pilotage Requirements for Torres Strait, 16 May 2006; Marine Notice 16/2006, Further Information on revised Pilotage Requirements for Torres Strait, 3 October 2006.

¹²¹ See Statement by Ambassador Vanu Gopala Menon, Permanent Representative, Permanent Mission of the Republic of Singapore to the United Nations, at the General Assembly Debate on Agenda Item 77(A): Oceans and the Law of the Sea, 10 December 2007, available at: www.mfa.gov.sg/content/mfa/overseasmission/newyork/archive/plenary/2007/200712/press_200712.html.

do not intend to call at an Australian port.¹²² Australia's experience seems to suggest that unilateral action to implement compulsory pilotage could not win support from user States.¹²³ In this respect, Article 43 of the LOSC merits particular attention with a view to reconciling such contrasting interests through international cooperation.¹²⁴

4.7 Customary law character of the right of transit passage

Some States, notably the United States and Thailand, are of the view that the right of transit passage is a codification of customary law.¹²⁵ However, it must be recalled that the regime of transit passage of the LOSC is a result of compromise and significantly beyond the rules of the 1958 TSC and traditional customary law in this matter.¹²⁶ In this respect, the closing statement by the President of UNCLOS III bears quoting:

The argument that, except for Part XI, the Convention [LOSC] codifies customary law or reflects existing international practice is factually incorrect and legally insupportable. The regime of transit passage through straits used for international navigation and the regime of archipelagic sea lanes passage are only two examples of the many new concepts in the Convention.¹²⁷

At present, there appears to be little evidence to prove that 'extensive and virtually uniform' State practice and *opinio juris* exist with regard to the right of transit passage. One can say, therefore, that the right of transit passage is a new regime established by the LOSC, and has yet to become a part of customary international law.¹²⁸

4.8 Non-suspendable innocent passage

As noted, the right of innocent passage applies to straits used for international navigation excluded from the application of Article 38(1); or between a part of the high seas or an EEZ and the territorial sea of a foreign State (Article 45(1)). Unlike the right of innocent passage through the territorial sea, there shall be no suspension of innocent passage through international straits by virtue of Article 45(2). As with innocent passage through the territorial sea, aircraft do not enjoy the freedom of overflight. Further, submarines and other underwater vehicles are required to navigate on the surface and to show their flag in the exercise of the right of non-suspendable innocent passage.

¹²² P. Dorling, 'Reef Safeguard Cut Back', *The Age*, 12 September 2011, available at: www.theage.com.au/environment/conservation/reef-safeguard-cut-back-20110911-1k4b3.html; Rothwell, 'Compulsory Pilotage', p. 17.

¹²³ *Ibid.*, p. 20. ¹²⁴ Scovazzi, 'The Evolution of International Law of the Sea', p. 186.

¹²⁵ Roach and Smith, *Excessive Maritime Claims*, p. 295; Statement of the Ministry of Foreign Affairs of Thailand (1993) 23 *Law of the Sea Bulletin* p. 108.

¹²⁶ Caflisch, 'La convention des Nations Unies', p. 52; O. Schachter, *International Law in Theory and Practice* (Dordrecht, Nijhoff, 1991), pp. 285–286; Brownlie, *Principles*, p. 271.

¹²⁷ A/CONF.62/SR.193, 193rd Plenary Meeting, *Closing Statement by the President*, 10 December 1982, pp. 135–136, para. 48.

¹²⁸ This view seems to be the majority opinion. Jia, *The Regime of Straits*, pp. 207–208.